



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-H-H-S-, INC.

DATE: OCT. 27, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a home health services provider, seeks to employ the Beneficiary as an operations manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Acting Director, Texas Service Center, denied the petition, finding that the record did not establish the Petitioner's ability to pay the proffered wage. The Director, Texas Service Center, affirmed the decision in response to the Petitioner's motion to reopen. Thereafter, we dismissed the Petitioner's appeal of the Director's decision and denied its subsequent combined motion to reopen and motion to reconsider.

The matter is again before us on a combined motion to reopen and motion to reconsider. We will deny both motions.

I. PETITIONER'S MOTION TO REOPEN

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

As discussed in our denial of the Petitioner's previous motion, the evidence of record at that time did not establish its ability to pay based on the wages it had paid the Beneficiary, or its net income or net current assets during the relevant period. The Petitioner has submitted no new or additional evidence in support of the current motion to rebut these findings. Instead, it seeks to overcome our prior analysis of its ability to pay pursuant to *Matter of Sonegawa*, 12 I&N Dec. 167 (Reg'l Comm'r 1967). Accordingly, our consideration of the record in this proceeding will be limited to the Petitioner's claims regarding our previous *Sonegawa* analysis and the evidence it now submits to establish that the totality of its circumstances, like those of the petitioner in *Sonegawa*, demonstrate its ability to pay the proffered wage.

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In support of its claim that the magnitude of its business operations establishes its ability to pay in this matter and that its prior motion was denied in error, the Petitioner submits the following evidence: a letter from [REDACTED] its Administrator-Executive Vice President; Certificates of Release of Federal Tax Lien; its federal income tax transcripts for 2013 and 2014; its Form 1120X, Amended U.S. Corporation Income Tax Return, for 2010; Forms 1120, U.S. Corporation Income Tax Returns, for 2011 through 2014;¹ its "Projected Income Statement for the Twelve Months Ending December 31, 2016;" graphics of its business performance from January through April 2016; a listing of the beneficiaries of the Forms I-140 it has filed in addition to the instant visa petition; 2012 - 2015 wage information for its Forms 941, Employer's Quarterly Federal Tax Returns; and its Forms 941 from 2011 through 2013. The Petitioner's brief also accompanies the motion.

Prior to considering the Petitioner's current motion to reopen, we will review the *Sonegawa*, analysis from our previous decision.

In *Sonegawa*, the petitioning entity had been in business for more than 11 years and routinely earned a gross annual income of approximately \$100,000. However, during the year in which the petition was filed in that case, the petitioner's income declined significantly as a result of changing business locations and paying rent on both the old and new locations for five months. There were also significant moving costs and a period of time when the petitioner was unable to do regular business. The former Immigration and Naturalization Service (now U.S. Citizenship and Immigration Services (USCIS)), nevertheless, found that the petitioner's prospects for resuming successful business operations had been established as the record demonstrated that she was a fashion designer whose work had been featured in national magazines, that she had a client list that included celebrities and individuals who appeared on lists of the best-dressed women in California, and that she was a lecturer on fashion design at design and fashion shows throughout the United States, and at colleges and universities in California.

Our previous review of the Petitioner's circumstances concluded that it had not demonstrated sustained economic growth as the tax returns it had submitted reflected that its gross income in 2014 had declined from that reported in 2010. We also found that although a prior letter from [REDACTED] had stated that the Petitioner employed more than 150 people in 2011, this total had included the employees of a sister corporation and that the Petitioner, as reflected in its Forms 941, had actually employed no more than 79 people during the period 2011 through 2013. Further, although we noted the Petitioner's assertions regarding its outstanding reputation in its industry, including its claims to be the first agency to become part of a [REDACTED] "accountable care organization" and the only home care agency in Northern Virginia to be included in another provider's home services program, we found the record to contain no evidence that demonstrated these contractual relationships were proof of the Petitioner's recognition within the home health care community. We also found that although the Petitioner had submitted evidence to establish that it had cleared a federal tax lien of \$326,932.07 from a total of more than \$500,000 in government tax liens, no evidence indicated that it had also paid the remaining government tax liens that had been

¹ The record does not contain the Petitioner's 2015 tax return, which should be submitted in any future filing.

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placed on it as of 2014. Finally, we indicated that our review of the record had found no evidence that the Petitioner, like the employer in *Sonegawa*, had incurred any uncharacteristic business losses or expenses, and that the Petitioner had not established its ability to pay the beneficiaries of the multiple Form I-140 visa petitions it had filed with USCIS. Considering these various factors, we concluded that the record did not establish the Petitioner's ability to pay pursuant to *Sonegawa*.

The instant motion to reopen is, again, supported by a letter from [REDACTED] who states that the Petitioner is financially capable of meeting its proffered wage obligations to the Beneficiary and the other beneficiaries for whom it filed Form I-140 petitions that were approved or pending during the relevant period. She notes that the company has been in business since January 21, 1999,² a period of 17 years, and asserts that its tax returns and Forms 941 reflect gross revenue and wages that establish its ability to pay. [REDACTED] further states that the Petitioner has "big financial prospects" and that her company will continue to grow at a rate of 8 percent a month during the remainder of 2016. She indicates that this growth will result from the Petitioner's acceptance into the [REDACTED] making it one of only three [REDACTED] certified home health agencies; continuing clinical improvements that will allow it to become the preferred provider of home health service to patients throughout Northern Virginia; and its increased marketing efforts, which have resulted in a doubling of referrals and a 100 percent increase in accepted patients each month. In support of [REDACTED] predictions regarding the Petitioner's sustained growth in 2016, the record contains a "Projected Income Statement for the Twelve Months Ending December 31, 2016" and [REDACTED] reports" that document the Petitioner's net revenue and operations during the period January through April 2016.³ She further states that her company is no longer burdened by the tax lien that was one of the factors considered in our prior *Sonegawa* analysis.

However, [REDACTED] reliance on the gross income reported in the Petitioner's tax returns and the wage totals reported on its Forms 941 as proof of its ability to pay the proffered wage is misplaced. Showing that a petitioner's gross receipts exceed the proffered wage or that it has paid wages in excess of the proffered wage is insufficient to establish ability to pay in employment-based immigration proceedings. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court held that the U.S. Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011) (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

Proof of the Petitioner's reputation within its industry, [REDACTED] asserts, is the fact that it is the first agency to be part of an accountable care organization, "a newly approved in-network provider

² The underlying labor certification reflects that the Petitioner began operations in 1998, which is supported by online business databases.

³ Although [REDACTED] indicates that she is submitting [REDACTED] reports for 2015, we find the record to contain only the reports for January through April 2016.

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partnership by [REDACTED] She also points to what she describes as its exclusive September 1, 2015, contract with [REDACTED] making it the first home care agency in Northern Virginia to engage with [REDACTED] services.

While we acknowledge [REDACTED] statements regarding the positive economic impacts that she predicts will flow from the Petitioner's acceptance into the [REDACTED] its clinical improvements and its increased marketing efforts, we do not find the record to support these claims. The Petitioner has not documented that its acceptance into [REDACTED] makes it one of only three [REDACTED] certified home health agencies. Neither is there evidence that identifies and documents the clinical improvements made by the Petitioner or the impacts of these improvements. We also find the Petitioner to have submitted no evidence of the increases in its marketing efforts and personnel. A petitioner cannot meet its burden of proof in this matter simply by claiming a fact to be true, without supporting documentary evidence. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *see also Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). A petitioner must support assertions with relevant, probative, and credible evidence. *Chawathe*, at 369. Moreover, even if we were to accept [REDACTED] predictions of the Petitioner's future growth as a result of these recent initiatives, it would not establish its ability to pay as of the September 22, 2010 priority date through 2014.

While we note the Petitioner's projected income statement for 2016, as well as the [REDACTED] reports for the period January through April 2016, this documentation establishes neither the Petitioner's continuing growth in 2016 nor its ability to pay the proffered wage as it is not supported by evidence identifying the source of its information or the financial data on which its projections are based. The unsupported representations of management are not reliable evidence and are insufficient proof of a petitioner's ability to pay the proffered wage.

For this same reason, [REDACTED] claims do not demonstrate that the Petitioner's acceptance into [REDACTED] and its contract with [REDACTED] reflect a well-established reputation in Northern Virginia's home health care industry. Although we note that the Petitioner previously submitted its contacts with [REDACTED] and [REDACTED] these contracts, by themselves, are not proof of the Beneficiary's standing in the home health care industry and the Petitioner has not submitted independent, objective evidence to establish that they may be viewed as confirmation of the regard in which it is held by its industry. A petitioner must support assertions with relevant, probative, and credible evidence. *Chawathe*, at 369.

The record also contains the Petitioner's brief, which echoes [REDACTED] claims regarding the company's ability to pay the proffered wage. In support of the instant motion, the Petitioner again asserts that its tax returns for the period 2010 through 2014 report steady growth in its gross income and wage payments, and, thereby, establish its ability to pay the proffered wage. However, as we indicated in our prior denial of the Petitioner's motion, its tax returns do not demonstrate steady income growth during this period. Instead, its 2014 tax return reports gross income of \$5,907,450, or \$543,895 less than the \$6,451,345 in income reported in its amended 2010 return. Moreover, as we also stated in our earlier decision, the tax information reported on the 2011 and 2012 tax returns that the Petitioner submitted in support of its prior motion and the instant motion is not consistent

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with that reported in the 2011(amended) and 2012 tax returns it submitted in response to the RFE that we issued in response to the Petitioner's appeal.⁴ As a result, we will not consider the gross income reported on the Petitioner's tax returns for 2011 and 2012. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of the evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, the record does not support the Petitioner's claim that it experienced steady income growth during the period 2010 through 2014. However, we note that, even if established by the record, annual increases in the Petitioner's income between 2010 and 2014 would be insufficient evidence of sustained growth in a company that began business operations in 1998.

Although the Petitioner also contends that the growth in its wage payments from 2010 through 2014 should be viewed as proof of its ability to pay the proffered wage, we find its reliance on wage obligations to be misplaced. Proof that a petitioner has met and continues to meet substantial wage obligations does not establish its ability to pay the proffered wage. Accordingly, we will not consider the Petitioner's wage expenses as determinative of its ability to pay in this matter.

The Petitioner also asserts that our prior review of its ability to pay under *Sonegawa* improperly considered the federal tax lien placed on its business by the U.S. Department of the Treasury. It contends that, as it had already satisfactorily resolved this issue, the lien should not have been a factor in our determination of its ability to pay. In support of this claim, the Petitioner submits copies of Certificates of Release of Federal Tax Lien, signed on July 29, 2015, and filed with the Clerk of the Circuit Court, [REDACTED] Virginia; the Clerk, State Corporation Commission, [REDACTED] Virginia; and [REDACTED] Circuit Court, [REDACTED] Virginia. Each of these documents reflects the Petitioner's payment of a single federal tax lien in the amount of \$326,932.07. The Petitioner, however, has misunderstood our previous discussion of this issue.

In our denial of the Petitioner's prior motion, we noted the Petitioner's payment of the \$326,932.07 federal tax lien, but did not find it to demonstrate that the Petitioner was, therefore, free of all the outstanding liens placed on its business, which totaled more than \$500,000 in 2014. In support of the instant motion, the Petitioner submits no additional release certificates relating to its other tax liens. Neither does it claim that these additional liens do not exist or that we incorrectly calculated the \$500,000 total indicated in our earlier decision. In the absence of such evidence, we find the government liens pending against the Petitioner to be appropriate considerations in assessing the totality of its circumstances.

In its brief, the Petitioner also asserts that, contrary to our prior finding, it is able to meet its proffered wage obligations with respect to the other beneficiaries for whom it has filed Form I-140 visa petitions. Where a petitioner has filed Forms I-140 for multiple beneficiaries, it must

⁴ We notified the Petitioner of these discrepancies in our April 29, 2016, decision and advised that, in any future proceedings, it would need to submit tax transcripts for these years. Although the Petitioner submitted tax transcripts for 2013 and 2014, it has not submitted the requested transcripts for 2011 and 2012.

demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each. See 8 C.F.R. § 204.5(g)(2); see also *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). Here, the Petitioner submits a listing of the 11 Form I-140 beneficiaries identified in our earlier decision as having been approved or pending as of the instant petition's priority date. The Petitioner annotates its list with the status of each individual, identifying those cases that, it believes, should not be considered in determining its total proffered wage obligation. However, it submits no evidence of the proffered wages for the listed beneficiaries or of any actual wages it paid these individuals. Therefore, the Petitioner has not overcome our previous finding regarding its ability to meet its wage obligations to its other Form I-140 beneficiaries.⁵

For the above reasons, we do not find that the Petitioner has provided sufficient evidence to establish that the totality of its circumstances establish its ability to pay. Unlike the employer in *Sonegawa*, the Petitioner, although in business since 1998, has not demonstrated a record of growth over its history or established its reputation within the home health care industry. Neither has it identified any abnormal business expenditures or losses that would have negatively affected its finances during the relevant period. Further, as has been noted, it has not resolved the evidentiary deficits identified in our denial of its prior motion. Accordingly, we will deny the Petitioner's motion to reopen.

II. PETITIONER'S MOTION TO RECONSIDER

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.*

In the instant motion to reconsider, the Petitioner asserts that we have erred in denying the visa petition as the regulation at 20 C.F.R. § 656.20(c)(2) does not require it to pay the proffered wage to the Beneficiary until after she acquires lawful permanent residence, a claim also made in its prior motion to reconsider in response to our dismissal of its appeal.

As we indicated in our denial of this prior motion, the Petitioner's assertion that it is not required to pay the proffered wage to the Beneficiary prior to her adjustment of status is correct. However, the fact that it need not actually pay the Beneficiary the proffered wage until she becomes a lawful permanent resident does not relieve the Petitioner of the burden of establishing its ability to pay the proffered wage as of the visa petition's priority date. This requirement is found at 8 C.F.R. § 204.5(g)(2), which states:

⁵ Although we note that the Petitioner in its previous motion indicated that the seizure of its business records by the U.S. Department of Homeland Security in 2012 prevented it from providing information for these beneficiaries, the Petitioner's current motion does not make this claim.

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner must establish that its job offer to a beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any subsequently filed immigrant visa petition, a petitioner must establish that a job offer is realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. In the present case, the priority date of the visa petition is September 22, 2010, and Part G.1. of the labor certification indicates a proffered wage of \$156,520. Accordingly, to meet the requirements of 8 C.F.R. § 204.5(g)(2), the Petitioner in this matter must establish its ability to pay the Beneficiary the annual proffered wage of \$156,520 from September 22, 2010, onward, as well as the proffered wages of the other beneficiaries for whom it filed Forms I-140 that were approved or pending during the relevant time period. *See Matter of Great Wall*, 16 I&N Dec. at 142, 144-145 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). Therefore, the Petitioner's assertion that we have erred in requiring it to establish its ability to pay the proffered wage as of the visa petition's priority date is not persuasive.

Moreover, the Petitioner has not supported the instant motion with pertinent precedent decisions establishing that our denial of its motion to reconsider was based on an incorrect application of law or USCIS policy.⁶ Neither has it submitted evidence demonstrating that our decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, we will deny the Petitioner's motion to reconsider.

III. CONCLUSION

The regulations at 8 C.F.R. §§ 103.5(a)(2), (3) allow for the filing of motions to reopen and motions to reconsider. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy, as well as evidence demonstrating that the decision was incorrect based on the evidence of record at the time of the

⁶ We note that the text of the brief submitted by the Petitioner references a number of this office's decisions. However, the decisions noted by the Petitioner are not the precedent decisions required by the regulation at 8 C.F.R. § 103.5(a)(3). Precedent decisions are those administrative decisions that are reached by this office, the Board of Immigration Appeals, and the Attorney General, and which are selected and designated as precedent decisions by the Secretary of Homeland Security, the BIA, and the Attorney General, respectively. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

initial decision.

In the present matter, the Petitioner has filed a motion to reopen that claims the evidence of record establishes that the totality of its circumstances establish its ability to pay the proffered wage. Its motion to reconsider asserts that we erred in requiring it to establish its ability to pay the Beneficiary the proffered wage as of the visa petition's priority date when DOL regulations impose no such requirement. For the reasons discussed above, the Petitioner has not met its burden of proof in either filing. We will, therefore, deny the Petitioner's combined motion to reopen and motion to reconsider.

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In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I& Dec. 127, 128 (BIA 2013). Here that burden has not been met. The instant combined motion to reopen and motion to reconsider are denied.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of C-H-H-S-, Inc.*, ID# 10478 (AAO Oct. 27, 2016)